No. 3911

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIRST NATIONAL BANK OF ANTIOCH (a corporation),

Plaintiff in Error,

vs.

R. H. McKEAN, GEO. N. CROSFIELD, C. B. HEARING, W. A. MEDLER, A. D. RICHELDERFER and W. N. MORSE,

Defendants in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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Counsel for defendants in error at the oral argument quote us as having admitted that the bond filed by the defendants in error in the action against Thornberry in the State Court was a consent that the said Court might enter judgment against the sureties therein.

They apparently misunderstood our position.

We do not so admit. We very earnestly assert that this undertaking which is a promise by the sureties that they will pay any judgment the plaintiff shall recover against Thornberry upon demand,

cannot by any means be construed to be a consent to the entry of a judgment against them at the time the judgment was entered against Thornberry. The authorities cited in our opening brief clearly establish that under the terms of *this* bond no obligation of the sureties existed until the Court had entered judgment against Thornberry and until *demand* had been made upon them for its payment.

The power of the Court under Section 308 to enter a summary judgment against the sureties at the time of the entry of the judgment against the defendant depends upon the promise of the surety to pay the judgment and, logically, that promise must be a contract to pay that judgment the instant it is entered. There must be a debt of the defendant and a debt of the sureties coming into being at the same time. This would be true had the bond contained an unqualified promise on the part of the sureties to pay the judgment. *It is not true* when they promise to pay the judgment only *after demand made therefor, or at some other future time.*

In order to make the sureties liable to a judgment there must certainly have been *an obligation with which they were charged.* No such obligation on their part existed when the state Court entered the judgment against Thornberry. The obligation of the surety did not arise until the demand was made and the demand could not be made for the payment of the judgment *until there was a judgment payment of which could be demanded.*

Consequently the *only remedy* against these sureties *was by action.*

We think the foregoing will remove any possible doubt as to our contention in this regard.

Passing now to the argument of counsel for the defendants in error, it is contended that the bond is statutory because it specifically states it was given in compliance with Sections 310 and 311. A new and more careful reading of the preamble of the bond than we have heretofore made convinces us that *it does not so state.* The bond says that the defendant *has applied for a release of the attachment in compliance with these sections.* It does not say that the *bond is in compliance therewith.*

The practice is this: defendant gives notice that he will apply for an order discharging the attachment. When the application comes on for hearing the defendant presents his bond. If it is accepted the attachment is discharged.

The recital in the bond is merely to the effect that the defendant has given the notice and made his motion for the discharge. It then goes on to say that "for the purpose of making the order" the sureties make the promise. It has been pointed out that the promise made was not a sufficient promise to have empowered the state Court to enter judgment under Section 308 against the sureties.

What occurred in the state Court was simply this: defendant made his motion for a release of the attachment as provided by the statute but when he

presented his bond he did not present a bond which was in compliance with Section 311. This is exactly the condition which existed in the case of Gardiner v. Donnelly, 86 Cal. 367 and is also the precise condition which brings the bond within the definition of a common law bond. (9 C. J. 32, p. 19 of our Opening Brief.)

The rule that a bond not in strict accord with a statute is yet valid as a common law bond, as a simple contract between the parties thereto, is so well settled that this in itself is a complete answer to the contention of Judge Littlefield in his oral argument that because plaintiff did not object to the form of the bond it is estopped from asserting that it is not in compliance with the statute. Plaintiff in error is here asking that it be enforced as a common law bond and said plaintiff has complied with each of its conditions as a precedent to bringing this action.

Counsel assert that this bond "is to the effect that the sureties will pay the plaintiff the amount of this judgment".

If we borrow from Jones $10 and give him a contract in writing saying: "We have this day borrowed from you $10 and we promise to the effect that we will pay it back to you" we very clearly promise to pay it forthwith. An action will lie on the contract immediately. On the other hand, if we borrow from Jones $10 and give him a contract saying: "We have this day borrowed from you $10 and we promise to the effect that we will pay it back

to you *one year from date"*, equally clearly we do not owe Jones the $10 until the end of the year. An action brought at any time previous to the year is premature.

The argument of counsel asserting that a bond to the effect that the sureties will pay *the judgment* is the same thing as a bond to the effect that they will pay *a judgment on demand* is preposterous.

The importance of the provision that the sureties will pay *on demand* is sustained by undisputed authority. The sureties are entitled to stand on the precise terms of their contract. (Pierce v. Whiting, 63 Cal. 538.)

The distinction between the bond here and the bond in Ebner v. Heid is plainly pointed out in our opening brief at pages 14 to 18, inclusive.

Referring to the figurative statement on page 12 of the brief of defendants in error permit us to again point out that the bond does not recite that it is a compliance with Section 311.

And further, permit us to point out that had the Circuit Court of Sherman County entered a judgment against the sureties on this bond they would undoubtedly have appealed from that judgment as the surety did in McCargar v. Moore (88 Or. 682, 157 Pac. 1107) and that the Supreme Court of Oregon undoubtedly would have held that the judgment was entered against them at a time when they did not under the precise terms of their bond owe plaintiff one cent and that said judgment was therefore void as to them.

And here we think it *apropos* to state that we have directed the course of plaintiff in this matter, and that prior to the entry of the judgment against Thornberry we gave our careful consideration to the provisions of the Oregon law which we are now discussing and refrained from asking the Circuit Court to enter a summary judgment against the sureties for two reasons: first, because we believed such a judgment against them would have been invalid, and, second, because we had before us Corpus Juris, and having first convinced ourselves that the Supreme Court of Oregon *had never* held that an action on a bond such as this *would not lie,* we relied upon the principle announced at page 351, par. 741 of vol. 6 Corpus Juris, together with the decisions cited thereunder and which are cited in our opening brief (pp. 27-29) as announcing the correct rule of law. Nothing that has since developed in this matter has shaken our conviction that we were absolutely right and we feel that the judgment of the District Court herein is most grievous error.

The right of the Court to enter a summary judgment does depend on the nature of the contract of the surety. This contract must be a promise to pay that judgment without any qualification for the statute will be *strictly construed in favor of the surety.* McCargar v. Moore, *supra.* Not having the right to a summary judgment we sought relief by this action on the bond.

We now turn to the question as to whether Section 308 is mandatory.

Counsel contend that the statute is mandatory because it says "shall".

The statute of Iowa quoted on page 27 of our opening brief distinctly uses "shall" and the Supreme Court of Iowa distinctly holds that the *statutory remedy is not exclusive.* (State v. McGlothlin, 16 N. W. 137.)

The State of Alabama has a statute providing for the summary entry of judgment against sureties on an appeal bond. It reads as follows:

> "When, on appeal or certiorari, the judgment is affirmed, judgment *must* be rendered by the court against the sureties as well as the principal, which must include the costs of the inferior and appellate court."
>
> Section 4725, Alabama Civil Code.

The word *must* is more mandatory in its nature than *shall.* The Supreme Court of Alabama in Jaffe v. Fidelity & Deposit Co., 60 So. 966, said:

> "The mere fact that the bond is good as a statutory bond and enforceable in the method provided by statute does not of itself prevent recourse to a common law action for its enforcement."

See also

> James v. Harry Kitziner Co. (Ala.), 68 So. 582.

The Oregon statute is not mandatory because it uses the word *shall.*

Counsel next contend that this statute is mandatory because this bond was given in an attachment

proceeding. An attachment and the lien afforded thereby arises *only by statute*. This bond, this simple written contract to pay money, does not arise out of statute. (See pp. 23-27 our opening brief.)

> "The plaintiff could have maintained an action on the bond if none (i. e., no remedy) had been provided by statute. The latter, therefore, is merely an additional remedy."
>
> State v. McGlothlin, *supra*.

In support of their assertion that Section 308 Oregon Laws is mandatory counsel cite Ah Lep v. Gong Choy, 13 Or. 431.

Oregon has a statute providing that when a judgment is rendered in the trial Court an appellant may have a stay of execution if he gives a bond for the payment of the judgment in event the judgment appealed from be affirmed or the appeal dismissed. There is a further provision for the summary entry of judgment against the sureties which provision is quoted on page 15 of the brief of defendants in error.

In the case just mentioned judgment was not given against the sureties. The respondent caused the mandate to be returned to the Supreme Court where it was corrected by giving judgment against the sureties. The appellant then sought to have the judgment against the sureties vacated.

The Court said that:

> "The language of the provision is peremptory and is subject to no exceptions that we are able to discover"

and held:

> "The respondent is therefore entitled to have his judgment entered against the sureties upon the appeal."

The decision of the Oregon Court in this case amounts to nothing more than a statement that it was authorized by the law and the bond in that case to give judgment against the sureties. The question as to whether or not the respondent, instead of asking the Court to correct the judgment could not have maintained an action on the bond was not before the Court and the Court does not pretend to either discuss or decide that question.

As a matter of law, the respondent in Ah Lep v. Gong Choy could have brought an action on his bond instead of asking the Supreme Court to correct its mandate by giving him the summary judgment. It is so held in the Alabama cases heretofore cited.

Permit us again to call attention to the use of the word *shall* in the Iowa law and the use of the word *must* in the Alabama law. Both words are decidedly *peremptory* but the statutes are not held to be mandatory in the sense that the "statute must be the guide and the limit as to the remedy sought".

A number of the states have statutes providing for the summary entry of judgment against sureties on appeal bonds and in *not one instance* has it been held that the statutory remedy is exclusive.

In State v. Boies, 41 Me. 344, the Supreme Court of Maine holds:

> "The second objection relied upon is, that the statute having provided in the 24th section a *specific* remedy for a breach of the condition of this recognizance, an action of debt will not lie therefor, and that such remedy alone can be pursued. The Court are of the opinion, that the remedy authorized by the peculiar provisions of this statute like that of *scire facias*, is only cumulative to that which the common law affords."

In Cockrell v. Owen, 10 Mo. 287:

> "Although judgment might have been entered on the recognizance on the trial in the Circuit Court, yet that does not seem to be the sole remedy. The condition of the recognizance shows that there may be cases in which the remedy cannot be employed. By the common law debt and *scire facias* were concurrent remedies on all recognizances. When the Legislature creates such instruments, those remedies tacitly attach to them, and although another may be given, there is no principle on which they can be denied. The law is harmonized by regarding the remedy given on the trial of the appeal as merely cumulative."

The Supreme Court of Texas in a most careful opinion says:

> "It is claimed that the statutory remedies upon the bond, which in Texas meet all the phases of liability are exclusive. But no case cited and none found sustains this doctrine. In Louisiana the sureties upon the bond are reached by a summary proceeding in the lower court. (Wilson v. Churchman, 6 La. Ann. 486.) And in Smith v. Gaines, 93 U. S. 341, it was

held that this remedy might be used in the federal circuit court in that state as a substitute for an independent suit on the bond; but there is no intimation anywhere that the judgment creditor may not waive the summary proceeding prescribed for his benefit, and pursue his common law remedy upon the bond. In Ohio the statute provides a remedy for the appellee in every case, except the dismissal of the appeal or the affirmance of the judgment and expressly authorizes suit on the bond in those two cases. This is held to be a statutory denial of the right to an independent suit in all other cases. On the other hand the bond being a contract, for the breach of which the comon law furnishes the forms and means of redress, the general principle is that statutory remedies are not exclusive. (2 Wait; Act and Def. 42, 286; Candee v. Hayward, 37 N. Y. 653.) In Lobdell v. Lake, 32 Conn. 16, in a suit upon an appeal bond it was held that the surety was liable although the statute provided another remedy for the very breach alleged. In State v. Bois, 41 Me. 344, the statute prescribed a specific remedy for the breach of a recognizance on appeal, but it was held that the obligee was not deprived of the right of an independent suit. The judgment on the bond in the appellate court—the validity of a law authorizing such judgment was affirmed on question, in Beall v. New Mexico, 16 Wall. 539, and summary proceedings against sureties are provisions for the benefit of the appellee or defendant in error, and whether beneficial or not, would be problematical if the obligee was confined to the statutory remedy in all cases. The object of law as well as the ends of justice, is best accomplished by holding that these remedies are cumulative, consistently with the enlightened precedents and the general principles of construction already noticed."

Trent v. Rhomberg (Tex.), 18 S. W. 510.

In a case decided in 1918 the Supreme Court of Washington held:

> "It seems to be well settled law that whatever statutory right a successful party upon an appeal may have to a summary judgment rendered by the appellate court against sureties upon a supersedeas bond in connection with the final disposition of the case by the appellate court is a remedy merely cumulative of the common law remedy, and does not affect the right of such successful parties to maintain an independent action upon such a bond in lieu of such statutory remedy."
>
> Empson v. Fortune, 172 Pac. 873; 2 R. C. L. 319.

> "On the breach of the condition of a valid and sufficient appeal bond or undertaking, the liability of the principal and surety may be enforced by an action on the bond. Summary remedies given by statute are regarded as cumulative, and do not deprive the obligee of the right to bring an action on the bond."
>
> 4 Corpus Juris, p. 1297, par. 2416.

The language of 2 Ruling Case Law 319, cited in the Washington decision, is as follows:

> "The ordinary common-law actions for the enforcement of bonds may of course be resorted to, and the statutes providing a summary remedy on appeal bonds are regarded as cumulative and do not affect the right to maintain such actions."
>
> "The contract of sureties on an appeal bond is entirely distinct from and independent of the judgment."
>
> "Since the undertaking of a surety is not a collateral one, but an absolute one to pay, the time for bringing an action on such an under-

> taking is regulated not by that part of the statute of limitations which relates to actions on *judgments,* but by the part which relates *to actions* on sealed instruments *for the payment of money.*"

In answer to the third reason upon which counsel urge Section 308 Oregon laws is mandatory we call attention to the language of the Supreme Court of Texas in Trent v. Rhomberg, *supra,* wherein it says that

> "summary proceedings against sureties are provisions for the benefit of the appellee."

Clearly, the provision for a summary judgment upon a release of attachment bond is for the benefit of the plaintiff and he may waive it and resort to his action on the contract.

As to the matter of double costs, however, it may be suggested that the defendants in error could have effectually avoided the costs of this action as well as the costs in error, if they had paid plaintiff in error the amount it seeks to recover in this action when that amount was demanded of them.

As to their recourse against Thornberry, they will have this when they have paid the judgment as they have promised to do and not before. It is by no means the fault of the plaintiff in error that they did not pay their debt when it was demanded of them. The plaintiff in error made formal demand that they pay it and they refused to do so.

Section 2847 of the Civil Code of California is but a re-enactment of the common law. The rule is universal and is as follows:

> "If a surety *satisfies* the principal obligation, or any part thereof, whether with or without legal proceedings, the principal is bound to reimburse what he has disbursed."

Defendants in error have never had any recourse against Thornberry because they have not paid this judgment. If they have suffered any detriment on this account since January 12, 1922, they alone are to blame for that. Had they paid the judgment when it was demanded of them there would have been no delay in their recourse. Counsel are most unreasonable when they complain of us for this situation.

The fourth reason in which it is asserted this statute is mandatory involves the matter which misled the District Court. (p. 17 of the brief of defendants in error.)

Section 308 Oregon laws provides for two separate and distinct remedies. The first is the plaintiff's remedy in the enforcement of the attachment lien. The attachment lien is a creature of the statute. It did not exist at common law nor is any remedy provided by the common law for its enforcement. Therefore in the enforcement of the *statutory lien* the plaintiff is confined to the *statutory remedy. The common law provides abundant remedy for the enforcement of the bond,* the simple contract of the sureties to pay money, and therefore the *plaintiff is not confined to the statutory remedy.*

The rule announced by the Supreme Court of Oregon in the decisions cited on pages 17 and 18 of the brief of the defendants in error is quite correct. But to hold to the same effect in the matter of the remedy against the sureties is to hold contrary to a principle long ago firmly established.

The true rule of law is well stated in Cockrell v. Owen, *supra,* as follows:

> "By the common law debt and *scire facias* were current remedies on all recognizances. When the legislature creates such instruments those remedies tacitly attach to them, and although another may be given there is no ground upon which they can be denied. The law is harmonized by regarding the remedy given on the trial of the appeal as merely cumulative."

In Jaffe v. Fidelity & Deposit Company, *supra,* it is said:

> "The general rule is that a special remedy given by statute is cumulative, and not exclusive of the ordinary jurisdiction of the courts, unless the manifest intention of the statute is to make such special remedy exclusive *and such intention must be manifested by affirmative words to that effect.*"

This same principle is stated in Smith v. Fargo, 57 Cal. 157.

Section 308 Oregon laws *does not provide in affirmative words that the remedy by summary judgment is exclusive.*

We agree with the cases cited on page 18 of the brief of the defendants in error to the effect that attachment proceedings are statutory.

We are not, in this action, seeking to enforce a statutory right; we seek to enforce the contract of the defendants in error to pay us a sum of money.

Counsel for defendants in error assert that the signing of the bond makes the sureties parties to the action. All of the cases cited in their effort to support this assertion are found under VI of their brief (page 6). We have examined them.

Winter v. Packing Co. holds that when the *defendant* makes a motion to release the attachment under Section 310, *he, the defendant,* makes a general appearance in the action and thereafter it proceeds as an action *in personam* and not as an action *in rem.*

In Spores v. Maude it was held that under the peculiar circumstances of that case a motion to dissolve an attachment upon the ground that it was improperly issued in an equity suit did not constitute a general appearance, the defendant having appeared specially for the purpose of making that motion.

Anvil Gold Mining Co. v. Hoxie and Roethler v. Cummings are to the same effect as Winter v. Packing Co.

In none of these cases did the Court discuss or attempt to discuss in *any manner whatsoever* the status of the surety upon a release of attachment bond in the light of determining whether or not he was to be deemed a party to the action.

The only case we are able to find bearing directly upon this question is Charleston Bank v. Moore, 6 Ga. 416, where it is held

> "The surety on appeal is *never treated as a co-ordinate party* during the progress of the suit. He is not known to the record as such. He is never notified of amendments to the pleadings, or to the filing of interrogatories. His death does not suspend the action.
>
> It is true that the act of 1826 allows the plaintiff to enter up judgment against the principal and surety on appeal, jointly or severally. But this is cumulative and permissive only, not imperative. He may do it or else, if he sees fit, pursue his common law redress by writ of *scire facias* or action of debt on the bond."

Manifestly counsel *are not correct* in their contention that the signing of the bond made the sureties parties to the action and constituted a general appearance by them.

It is also difficult to understand how the release of Thornberry's property was any *relief* to them as asserted.

In the case of Holbrook v. Investment Company, cited by counsel on page 25 of their brief, the contention of sureties on an appeal bond was that the Court could not enter a judgment against them because they would be thereby deprived of their day in Court.

The Court held that under the Oregon law it had power to enter judgment against them. It did not base its right to enter judgment against them upon

the ground that they were *parties to the action.* It simply held, following Beall v. New Mexico, that when they gave their bond to pay the judgment they had formed a *privity of contract* with the respondent and that there was an implied consent that the judgment should be so entered. The Court said that they became *parties to* and were bound by the *judgment.* In the case of an appeal bond the bond is not given until there is a judgment entered. In this case there was no judgment when the present bond was filed. If the Court in the Sherman County case had entered judgment against them at the same time it entered judgment against Thornberry they would have then been parties to the judgment. Such a judgment was never entered. So in this case the sureties were never parties to the action nor were they ever parties to the judgment. Their status in the Sherman County case was that of *mere sureties* and nothing more.

We think the facts and the law applicable to this case are so plain that there can be no doubt but that the state Court had no right to enter judgment against these sureties and that our only remedy was by action.

We think the law is established beyond all question that whether the Sherman County Circuit Court did or did not have the right to enter judgment against the sureties that the plaintiff had the right at law to choose either to seek relief on this bond by the statutory remedy or by the remedy of the action on the bond, as it desired.

The statement in IX, page 7 of the brief of defendants in error, is correct, but the only parties to the action in the state Court were the *plaintiff in error here and H. B. Thornberry.*

If, after plaintiff in error had brought the action against Thornberry in the state Court it had then brought another action having the same object and over the same subject matter in District Court of the United States in and for the district in which Thornberry was a citizen and resident, while the action in the state Court was still pending the District Court would have then had no jurisdiction. This is the rule announced by decisions cited on pages 7 and 8 of counsels' brief. They have no bearing on this case whatsoever.

In closing we desire to say that in no case in Oregon has it been held that an action may not be maintained against the sureties on either a release of attachment bond or upon an appeal bond; that in every state in this country which has either a statute providing for the summary entry of judgment upon a release of attachment bond or upon an appeal bond that it has been held, universally and without exception, that the summary remedy and the remedy by action on the bond are concurrent remedies and that either the one or the other may be selected by the plaintiff as he chooses.

It thus must follow that this action being one for the recovery of a sum of money in excess of $3000 due from the defendants in error to the plaintiff in error upon a simple contract based upon a sufficient

consideration, plaintiff being a citizen of California and defendants being citizens of Oregon, that the District Court of the District of Oregon has jurisdiction of the persons of the defendants, of the subject of the action; that plaintiff has the legal capacity to sue and that its complaint states a cause of action.

"Undertakings given on suing out writs of attachments; undertakings given to *secure the discharge of attachments;* undertakings to obtain orders of arrest; undertakings to secure release from imprisonment thereunder, supersedeas bonds and undertakings on appeal; bonds given on the allowance of a writ of injunction; bonds given by the plaintiff, and also bonds given by the defendant in replevin actions, to obtain possession *pendente lite* of the property in controversy,—all these and other obligations given in the course of judicial proceedings *may,* in the absence of some statute to the contrary, *be sued on in any court having jurisdiction of actions on contract involving a like amount.*"

Braithwaite v. Jordan, (N. D.) 65 N. W. 701.

We respectfully submit that the judgment of the District Court should be reversed and said Court directed to overrule defendants' demurrer to plaintiff's complaint.

Dated, San Francisco,
October 18, 1922.

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